



March 14, 2022

Testimony of Jonathan Shaer

Executive Director, New England Convenience Store & Energy Marketers Association

Connecticut General Assembly
Public Health Committee

SB 367 – An Act concerning electronic nicotine delivery systems and vapor products.

Statement of Opposition

Chairwoman Daugherty Abrams, Chairman Steinberg and Members of the Committee,

The New England Convenience Store & Energy Marketers Association (NECSEMA) represents convenience stores and the business which supply them. NECSEMA members own, operate and/or supply the nearly 1,700 convenience stores in Connecticut which employ over 25,000 people and generate over \$6.5 billion in sales annually.

As drafted, SB367 bans all flavored electronic nicotine delivery systems (ENDS), imposes a nicotine cap of 35 mg/ml, and doubles retailer penalties for compliance violations. The bill also notably omits any reference to exempting products that receive an FDA Pre-Market Tobacco Application (PMTA) authorization or a Modified Risk Tobacco Product designation.

NECSEMA strongly discourages municipal or statewide bans and/or restrictions of tobacco products and specific flavors that have broad market demand. When these products – whether they are flavors including menthol, or higher nicotine content products – remain readily available in other states and online then it becomes a policy doomed to fail. This is what happened in Massachusetts when it enacted a complete flavored tobacco ban effective 6/1/20. Since it began, 87% of cigarette tax stamps once sold in MA are now sold in NH and RI, and the state saw an increase in tobacco-flavored cigarettes, vape and smokeless. Over 97% of once banned product can now be accounted for. People will find the products and flavors they prefer even if they are no longer available in a particular jurisdiction. Massachusetts lost over \$130 million in one year and cannot claim a public health victory. In fact, in their March 2022 report, the multi-agency Illegal Tobacco Task Force “now identifies the cross-border smuggling of untaxed flavored ENDS products, cigars, and menthol cigarettes as the primary challenge for tobacco enforcement in the Commonwealth.”

The federal government has taken sweeping action against ENDS and flavors in the past few years. In 2020, it banned all pod-based flavored ENDS except menthol and tobacco flavors because, at the time, those were the products youth had gravitated toward. However, the left open a loophole for *disposable vape* products which today come in hundreds of flavors, are inexpensive and easy to conceal. These are now the products that youth are predominantly using. In fact, according to the 2021 National Youth Tobacco Survey (NYTS), *Among students who currently used e-cigarettes, 53.7% used a disposable device.*¹

¹ <https://www.fda.gov/tobacco-products/youth-and-tobacco/results-annual-national-youth-tobacco-survey>

Also in 2020, Congress extended the applicability of the PACT Act to include ENDS and now there are rules and regulation about the delivery of ENDS through the mail. Notably, this legislation prohibits the USPS from delivering ENDS, and, more recently, UPS and Fedex prohibit the shipping of ENDS via their services.

Perhaps most significantly is the FDA's PMTA and MRTP authorization process. This scientific-based approach requires all ENDS products which were marketed after 2/15/07 to submit an application to the FDA to remain commercially available. To earn a PMTA, the product application must demonstrate it is *appropriate for the protection of public health*. Of the 6.5 million applications submitted, the FDA has authorized only 3 ENDS products². That means once the process is complete, there will only be a handful of ENDS products remaining legally on the market. NECSEMA would think the Public Health Committee and Connecticut would want these products available if the FDA deems them appropriate to protect public health. However, if SB367 is enacted this would be impossible for any flavored product or product with a nicotine content higher than the artificially selected 35 mg/ml.

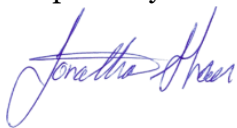
Finally, there is no justifiable reason to double the penalties on retailers. Focusing solely on licensed retailers ignores other access points such as social sourcing and online sales. However, the fact that this is proposed reinforces our point that the licensed, regulated and enforced market is where these products are best sold through. When these products are banned, they are pushed outside this framework into an environment the state enforcement agencies have little control.

Connecticut should allow the FDA to continue its work and not implement contradictory state policies. It will lead to enforcement challenges the state is ill-equipped to address. Today products are sold in a regulated and enforced environment. A ban and nicotine restriction will push those products over state lines, online and into existing black markets. At the same time robbing the state of tax revenue and local retailers of adult customers.

If the committee feels compelled to do something, we recommend:

1. Close the *disposable vape loophole* by focusing restrictions around disposable flavored vape products with a tobacco and menthol exemption.
2. Do not ban menthol as a prohibited flavor and do not introduce a nicotine cap. There is too much demand for both products and it will result in an enforcement nightmare. Also, there remains strong evidence ENDS are an effective harm-reduction tool and tobacco and menthol should exist as an off-ramp for combustible cigarette products. According to the FDA *e-cigarettes expose users to fewer harmful chemicals than burned cigarettes*³
3. Add language to allow PMTA and MRTP products. The following language is suggested: *This section shall not apply to the sale or distribution or causing to be sold or distributed or offer for sale of any product that receives a marketing order from the United States Food and Drug Administration under 21 U.S.C. § 387j.*

Respectfully submitted,



Jonathan Shaer
Executive Director

² <https://www.fda.gov/tobacco-products/premarket-tobacco-product-applications/premarket-tobacco-product-marketing-granted-orders>

³ https://www.cdc.gov/tobacco/basic_information/e-cigarettes/Quick-Facts-on-the-Risks-of-E-cigarettes-for-Kids-Teens-and-Young-Adults.html

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